TORT AND ABSOLUTE LIABILITY — SUGGESTED CHANGES IN CLASSIFICATION

II

ASSUMING that the term "tort" is generally to be used as including only cases of fault, and further assuming that "fault" involves wrong intention or culpable inadvertence, what specific kinds of injuries heretofore grouped under the general head of torts should continue to be classed under that head? Where, for instance, should we class Assault, or Deceit, or Defamation? Under tort, as involving fault as an essential requisite, or in the third class, where the law imposes absolute liability in the absence of fault?

In what specific kinds of injury is fault, generally, a requisite to liability?

A full discussion of this question would require us to go behind conventional names (such as Assault or Deceit) and consider the precise nature of the right to be protected or the duty to be enforced. But we can here deal with the question only in outline.

If we take up, one by one, the various specific torts, which are usually designated by conventional titles and are named according to the nature of the right affected or the harm done,[1] we shall find two things:

1. In most, though not in all, of these specific torts fault is, as a general rule, requisite to liability.

2. But, although fault is generally requisite, yet there are exceptional instances of absolute liability in the absence of fault. And such instances are not confined to any one or two of these various kinds of tort, but are liable to occasionally occur in any or all of them (except Malicious Prosecution). Under the classification suggested in this article, such instances would belong, not under torts, but under the third class of absolute liability.

[1] As to "Unnamed Wrongs," or injuries outside of "the known causes of action which have received names," see BISHOP, NON-CONTRACT LAW, §§ 485–94; Sir F. Pollock, 14 ENCYCLOPÆDIA OF LAWS OF ENGLAND, 2 ed., 135, paragraph 2; Judge Swayze, 25 YALE L. J. 1.

Before enumerating the so-called "specific torts" as to which fault in some form is, generally, a requisite to liability, it must be noted that there is a difference as to the kind, or grade, of fault required in various cases. Rights or interests which receive some protection from law are not all equally protected. Some are protected more highly than others. Thus, a right may be protected only against a violation proceeding from bad motive. In other words, bad motive may be one of the essential requisites to an action (*e. g.*, malicious prosecution). Or a right may be protected against intentional wrongdoing, but not against harm due to merely negligent conduct. Or another right may be protected against harm caused negligently. And, in some cases, where it is conceded that fault is essential, there may be a controversy as to exactly what kind or species of fault is requisite.

In the following so-called "specific torts" it is the general rule that fault, in some form or other, is requisite to (*primâ facie*) liability: Assault, Battery, Imprisonment, Malicious Prosecution, Injurious Falsehood,[2] and Deceit.[3]

In Defamation, heretofore usually classed under the general head of tort, fault, though as a matter of fact it is generally present, is not an essential requisite to making out a *primâ facie* case.[4] Hence, under our proposed reclassification, Defamation would come within the third class.[5]

In "Slander of Title," so-called,[6] fault is not requisite to sustain an action against a stranger; but it is essential in an action against a rival claimant.[7] It would seem that this general topic (Slander of Title), heretofore treated as a unit, must be separated into two

[2] See this species of tort distinguished from both Deceit and Defamation, in SALMOND, TORTS, 4 ed., 504.

[3] It has sometimes been thought that False Representation should be dealt with under, or as a branch of, the Law of Contract rather than the Law of Tort. See Professor Wigmore, 8 HARV. L. REV. 395.

Compare POLLOCK, TORTS, 10 ed., 293–94; 1 BOHLEN, CASES ON TORTS, Preface, iii.

[4] See fuller statement by the present writer in 60 U. PA. L. REV. 468–72. See also Lord Herschell, in Allen *v.* Flood, [1898] A. C. 125–26. Sir F. Pollock, though recognizing the law to be now established as above stated, evidently entertains some doubt as to its beneficial operation. See 60 U. PA. L. REV. 468, n. 23; 472, n. 31.

[5] Of course questions of fault may arise in rebutting the defense of conditional privilege.

[6] Better substitute "Disparagement" for "Slander." See 13 COL. L. REV. 13.

[7] See article by the present writer, 13 COL. L. REV. 29–31.

divisions. Slander of Title against a rival claimant remains under tort. Slander of Title against a stranger belongs under the third class.

As to intermeddling with, or damage to, personal property, we believe that fault is now, as a general rule, requisite to liability.[8]

As to entry upon, or actual damage to, real estate:

Because the law does not require a plaintiff, in an action for entry upon real estate, to prove that he suffered actual damage (in the sense of pecuniary loss), it sometimes seems to be supposed that plaintiff need not prove that defendant was guilty of actual fault. It seems to be virtually argued that the commission of actual fault by the defendant is not requisite any more than the suffering of actual pecuniary damage by the plaintiff. This reasoning is erroneous. As already suggested, the two questions of damage and fault are entirely distinct from each other.

That one entering upon real estate is not liable in the absence of fault is, we believe, the prevailing rule to-day. It is subject to an exception of large scope and great importance, but it constitutes the general rule.

But we think that an *intentional* entry standing alone and unexplained involves fault. The defendant has consciously infringed the plaintiff's right to have his land free from invasion.[9] In the

[8] But this rule is subject to an exception of great scope and importance, which prevents exoneration in many cases of non-culpable conduct. That exception is the doctrine that a *bonâ fide* and non-negligent mistake as to title in the property does not generally furnish a bar to liability. This doctrine, which also applies to real estate, is referred to *post* under Absolute Liability.

This exception is, however, itself subject to an exception in the case where the articles of property are in the shape of currency. One who, in good faith and for value, receives currency which did not in fact belong to the person from whom he received it, becomes the owner of such currency, and does not become a wrongdoer because he asserts the rights of ownership. As to the reason for this doctrine, see 2 PARSONS, BILLS AND NOTES, 110.

[9] Of course the doing of physical harm to the land itself is not the only way of violating the owner's rights. His right of beneficially using the land may be substantially impaired without doing harm to the soil. And the owner's right of user necessarily includes the right and power of excluding others from using the land. "For a power of indefinite user would be utterly nugatory, unless it were coupled with a corresponding power of excluding others generally from any participation in the use.

". . . Violations of the right of exclusion (when perfectly harmless in themselves) are treated as injuries or offences by reason of their probable effect on the rights of user and exclusion. A harmless violation of the right of exclusion, if it passed with perfect impunity, might lead, by the force of example, to such numerous violations of the right as would render both rights merely nugatory." 2 AUSTIN, JUR., 3 ed., 836, 837.

absence of any special justification [10] the defendant's intentional entry is faulty and tortious. In one case proof of the absence of fault will not exonerate the defendant, *viz.*, where the defendant's intention was due to a non-negligent, but mistaken, belief as to the title to the land. Mr. Salmond, apparently, would not confine the exception to the case of mistake as to title, but would go so far as to hold that an inevitable mistake on any subject whatever will not exonerate the defendant.[11] The question will be referred to later under the head of Absolute Liability.

As to *unintentional* entry: the view that it is not actionable in the absence of fault is sustained by the weight of modern authority. It "is not actionable unless due to negligence." [12] Of course this modern view involves a total departure from the old days when a man was held liable, "quite irrespective of moral fault," for harm "whether to another person, personal property, or real estate," which his act had caused.[13] At the present time, when unintentional harm is done to the person or to personal property, "the rigor of the early law" has been relaxed, and recovery must gen-

It is common to say that the action in such a case is allowed because the law "presumes" damage. The presumption is a fiction, and it is unnecessary to resort to it. Stated without fiction, the law is that a voluntary entry on land is *primâ facie* actionable, even though, in the particular instance, it has done the plaintiff not the slightest harm. "The explanation of these cases in which a right of action is conferred on a person who has sustained no harm is to be found in the fact that certain acts are so likely to result in harm that the law prohibits them absolutely and irrespective of the actual issue." See SALMOND, TORTS, 4 ed., 12.

Judge Wells, in Walker *v.* Old Colony, etc. Ry. Co., 103 Mass. 10, 14, pronounced the right of exclusion to be "one of the valuable incidents of the ownership of land." This right of exclusion is a property right, protected by the constitutional prohibition against taking property for private use or without compensation. The Vermont Act of 1892, No. 80, Section 31, provides that "no action shall be maintained against any person for crossing uncultivated land to reach public waters for the purpose of taking fish, unless actual damage has been sustained." In Trout & Salmon Club *v.* Mather, 68 Vt. 338 (1895), this act was held unconstitutional.

[10] As to various justifications of entry on land, see BIGELOW, TORTS, 7 ed., §§ 478–89.

[11] SALMOND, TORTS, 4 ed., 186.

[12] *Ibid.*, 186. The learned author adds: "No action will lie against a defendant whose horse runs away with him on a public highway and carries him without any negligence of his upon the adjoining land of the plaintiff." For this statement he cites, in note 4, two actions of trespass to the *person*, adding, "but there is no reason to doubt that the principle applies generally to all forms of trespass." An authority more directly in point is found in Brown *v.* Collins, 53 N. H. 442 (1873).

[13] See Professor Bohlen, 59 U. PA. L. REV. 309, 310.

erally be based upon culpability. But in some quarters, entitled to respect, there is still a tendency to hold that, when real estate is damaged or invaded, the old rule of absolute liability remains unchanged.[14]

On principle, and on the weight of modern authority, there is (in the absence of culpability) no liability for accidental damage or entry in the case of real estate any more than in the case of damage done to personalty or to the person.[15]

If fault is requisite to an action for defendant's personal entry upon plaintiff's land, there can be no reason why it should not be requisite to an action for damage to plaintiff's land, due to acts done by defendant upon defendant's land without personal entry by defendant upon plaintiff's land. Suppose that acts are done by defendant upon defendant's land, which have the effect of causing deleterious things to pass from defendant's land upon or over plaintiff's land, thereby damaging plaintiff's land or impairing plaintiff's comfortable enjoyment of his land. Such a case is generally classed under the head of nuisance, as distinguished from trespass. Mr. Salmond speaks of it as a nuisance "in the strict sense of that term." [16] Is it requisite to defendant's liability that his acts done upon his own land should be blameworthy? We should say yes, as a general rule, subject, however, to an exception in those cases where defendant's acts fall within the so-called "extra-hazardous class." As to the requirement of fault, there is a conflict of authority. But if we are right in the position that plaintiff must prove fault in an action for personal entry, it is difficult to see how the plaintiff can claim to occupy more favorable ground in the present supposed case. Defendant is liable if, without justification,[17] he inten-

[14] See MARKBY, ELEMENTS OF LAW, 3 ed., § 711; and compare 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 306.

[15] See Professor Whittier, as to real estate, 15 HARV. L. REV. 347; and compare as to personalty, 342; and as to the person, 339. See also, as to real estate: Losee *v.* Buchanan, 51 N. Y. 476 (1873), and see Earl, C., p. 490; Brown *v.* Collins, 53 N. H. 442 (1873); Marshall *v.* Welwood, 38 N. J. L. 339 (1876); all opposing the reasoning in the House of Lords in the then recent decision in Rylands *v.* Fletcher, L. R. 3 H. L. 330 (1868). See, also, Opinion of Martin, B., in Fletcher *v.* Rylands, 3 Hurl. & Colt. 774, 793 (1865); and argument of Mr. Mellish in that case, p. 785. See further, LAWS OF ENGLAND, edited by Lord Halsbury, vol. 27, § 1515; Rumbold *v.* London County Council, 25 T. L. R. 541 (1909); SALMOND, TORTS, 1 ed., 159.

[16] SALMOND, TORTS, 4 ed., 175.

[17] The justification most frequently set up is that defendant's acts do not exceed his right to make a reasonable use of his own land.

tionally or negligently inflicts substantial damage upon the plaintiff.[18]

Would the adoption of the requirement of fault in this class of cases prevent recovery in a large proportion of litigated suits where plaintiff could have prevailed if the rule of absolute liability was adopted?

We think not; and for two reasons:

1. Fault, as heretofore defined, exists, and is easily provable, in a great majority of cases where damage has resulted. And this is so even where the damage sued for occurred as a first result of the dangerous condition.

2. In a majority of litigated cases the damage sued for was continuous, or at least occurred repeatedly.[19] Assuming that the defendant was not at fault for not foreseeing the first outbreak or harm, and hence was absolved from liability for damage occurring in the first instance, still, after he knows that damage has occurred and is likely to repeatedly occur, he is liable for failing to obviate the cause of the subsequently occurring damage. "If he fails to do so, his liability from such time must, upon principle, be the same as it would have been could he have foreseen the result in the first instance." His liability arises "from a continuance of the cause of injury, after its character becomes apparent."[20] Thus, if the defendant knew the damaging effect of a spout maintained by him, he would be answerable for the harm it subsequently did "until he stopped it."[21]

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[18] As to what constitutes sufficient damage, see SALMOND, TORTS, 4 ed., 214–17.

[19] An author who thinks that an isolated escape of a deleterious thing on to plaintiff's land might be classed under nuisance, says: "Nuisance is commonly a continuing wrong; that is to say, it commonly consists in the establishment or maintenance of some state of things which continuously or repeatedly causes the escape of noxious things on to the plaintiff's land." SALMOND, TORTS, 4 ed., 211.

[20] Crawford *v.* Rambo, 44 Ohio St. 279, 286–87, 7 N. E. 429 (1886); Davis *v.* Rich, 180 Mass. 235, 62 N. E. 375 (1902), Holmes, C. J., p. 238; GLEGG, REPARATION, 1 ed., 282.

[21] See Davis *v.* Rich, 180 Mass. 235, 238, 62 N. E. 375 (1902).

The conflict of authority as to the requirement of fault is not confined to the particular kind of nuisance above discussed, but exists as to certain other varieties of nuisance. In the books the broad question is sometimes raised, whether the requirement of fault exists as to the general subject of nuisance. See Judge Cooley in favor of the general requirement of fault; TORTS, 2 ed., 670–71. For apparently opposing views, see 29 CYCLOPÆDIA LAW AND PROCEDURE, 1155; 1 WOOD, NUISANCE, 3 ed., 48; 2 WOOD, 783; 21 LAWS OF ENGLAND (Halsbury), § 845, p. 507. But an attempt

The third class (absolute liability where there is neither breach of contract nor fault) is largely made up of two elements which have often been spoken of as if they were entirely distinct from each other.

Division 1. Cases of absolute liability which, heretofore, have usually been classed under tort.

Division 2. Cases of absolute liability which, heretofore, have been regarded as more nearly akin to breach of contract than to tort.

In both divisions there is an obligation imposed by law, in the absence of either contract or fault on the part of defendant.[22]

Consider now:

Cases of absolute liability in absence of fault, which heretofore have usually been classed under tort. (Division 1, *supra.*)

These cases may be divided into three classes:

(*a*) Liability for non-culpable mistake.

(*b*) Liability for non-culpable accident.

(*c*) Vicarious liability for the wrongful acts of others.[23]

The last class (*c*) is generally dealt with under the law of master

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to answer this question as to the general subject would involve hopeless confusion, on account of the ambiguity, the vagueness, and the broadness of the term nuisance. A "wide range of subject-matter" is embraced under it. The term nuisance, when used as denoting an actionable tort, is not confined to denoting a single specific kind of tort. It is "a term of classification applied to a group into which certain wrongs are gathered for convenience of reference." TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, § 434. It is used as including under one general head various subjects which, upon any scientific principles of classification, do not belong together, and most or all of which are to be found under various separate and distinct titles of the law. The wrongs classed under the general head of nuisance "are breaches of various duties." See INNES, TORTS, Preface, 4; BISHOP, NON-CONTRACT LAW, § 411, n. 1; SALMOND, TORTS, 4 ed., 210; Prof. E. R. Thayer, 27 HARV. L. REV. 326.

Legal authors admit the difficulty, not to say the impossibility, of framing a general definition of the term nuisance. Judge Cooley says: "It is very seldom, indeed, that even a definition of a nuisance has been attempted, for the reason that, to make it sufficiently comprehensive, it is necessary to make it so general it is likely to define nothing." TORTS, 2 ed., 672. Mr. Garrett says: "It is indeed impossible, having regard to the wide range of subject-matter embraced under the term nuisance, to frame any general definition. . . ." GARRETT, NUISANCE, 3 ed., 4.

Instead of discussing the broad question, whether the requirement of fault exists as to the general subject of nuisance, it would be better to consider separately what the rule as to fault is in regard to each of the various incongruous topics which are usually lumped together under the one general head of nuisance.

[22] KEENER, QUASI-CONTRACTS, 15; ANSON, CONTRACTS, 12 ed., 8.

[23] This division substantially agrees with SALMOND, TORTS, 4 ed., 15.

and servant and the law of domestic relations. It will not be discussed here.

To consider the two first classes (*a* and *b*) we must begin by distinguishing between accident and mistake.

"A case of accident then is one where the *effect* was neither intended nor was so probable a result as to make the conduct negligent. On the contrary, in the cases of mistake that arise the *effect* is *intended*, and the error consists in thinking that such an effect is not tortious." [24]

"The plea of inevitable accident is that the consequences complained of as a wrong were not intended by the defendant and could not have been foreseen and avoided by the exercise of reasonable care. The plea of inevitable mistake, on the other hand, is that, although the act and its consequences were intended, the defendant acted under an erroneous belief, formed on reasonable grounds, that some circumstance existed which justified him." [25]

"Accident, in this System, means an event happening without the concurrence of the will of the person by whose agency it was caused. It differs from mistake, because the latter always supposes the operation of the human will in producing the event, although that will is caused by erroneous impressions on the mind." [26]

Take first non-culpable mistake. When is there civil liability?

Mr. Salmond [27] says that "inevitable" (by which he means non-culpable) "mistake is commonly no defense at all" against civil liability. Later, page 14, he adds: "To this general principle of absolute liability for mistake the law recognizes a few exceptions of minor importance. . . ."

One of the fullest and ablest discussions of this topic is the article by Professor Whittier.[28] Looking at the question as a matter of principle, the learned writer thinks that the general rule should be that non-negligent mistake of fact constitutes a defense to civil liability. But he regards the weight of authority as *contra*. As to damage to the person, he recognizes that there is a seeming conflict of authority. He says: "On the one hand, we have certain instances where the mistake is held no excuse; on the other hand, we have even more numerous sets of circumstances in which the defendant is

[24] Professor Whittier, 15 HARV. L. REV. 336–37.

[25] SALMOND, TORTS, 4 ed., 16.

[26] 2 EDWARD LIVINGSTON, COMPLETE WORKS ON CRIMINAL JURISPRUDENCE, 641.

[27] TORTS, 1 ed., 12.

[28] 15 HARV. L. REV. 335–52.

not held." And he believes "that no adequate distinction can be drawn between these two lines of cases." As to damage to personalty and realty, he says that the courts "almost invariably" refuse to sustain the defense of non-negligent mistake.[29]

Upon the general question we differ from Salmond, and to some extent from Whittier.

It is true that, in many actions for intentionally intermeddling with property, the defense of non-negligent mistake has not been sustained. But in almost all the reported cases under this head the particular mistake set up was in regard to the title to the property. The defendant has alleged that he without negligence believed that the property belonged either to himself or to the person under whose authority he was acting. The cases overruling this defense are regarded by us as deciding only that *a mistake concerning this particular subject, i. e., a mistake concerning title*, does not avail as a defense.[30] These particular cases do not decide whether mistakes on other subjects do, or do not, constitute a defense to actions for damage to property or to the person.

We do not think that there is any general rule as to whether non-negligent mistake does, or does not, exonerate from civil liability. Each particular set of cases seems to us to be decided upon the special reasons of policy or expediency bearing upon that particular set of facts.[31]

Although two rights may be of equal intrinsic value, yet the efficient protection of one right may require the allowance of conduct which would not be so necessary to the protection of the other right. The nature of the particular right to be protected affects the method of protection to be allowed by law.

Consider now cases of non-culpable accident. Here non-liability is the general rule.[32]

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[29] See 15 HARV. L. REV. 339, 340, 341, 342, 347.

[30] Professor Whittier earnestly argues that this doctrine as to title is wrong on principle, but he admits it to be supported by an overwhelming weight of authority. See 15 HARV. L. REV. 343–47. As to the inexpediency or injustice of this doctrine, we are unable to concur with Professor Whittier.

[31] This view explains some alleged inconsistencies in the decisions relative to damage to the person, pointed out in 15 HARV L. REV. 341–42.

[32] "Pure accident will hardly seem to any one who is not a lawyer to be a special ground of exemption, the question being rather how it could ever be supposed to be a

In so-called cases of extra-hazardous user, a man is said to act at his peril, and is held absolutely liable though without fault. By "acting at peril" is here meant

"that there is some act which the law does not forbid, some act from which there is no primary duty or obligation to abstain, but for which, if a man does it and harm ensues, he will be liable to make compensation." [33]

"The law . . . considers, not that the act is so dangerous as to be negligent and wrongful, but that it is so dangerous as to be allowable only on the terms of insuring the public against harm." [34]

The modern doctrine that in certain exceptional cases a man acts at peril is a survival of the time when *all* a man's acts were done at his peril.[35]

Why should the law, at the present day, maintain that there is *any* extra-hazardous class of acts which are performable only at the peril of the doer? The following explanations have been suggested:

"As a matter of history, such cases cannot easily be referred to any definite principle. But the ground on which a rule of strict obligation has been maintained and consolidated by modern authorities is the magnitude of the danger, coupled with the difficulty of proving negligence as the specific cause in the event of the danger having ripened into actual harm." [36]

"The possibility of a great danger has the same effect as the probability of a less one, and the law throws the risk of the venture on the person who introduces the peril into the community." [37]

In Salmond on Jurisprudence,[38] it is said (as to some "exceptionally dangerous forms of activity"):

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ground of liability. But it was supposed so by many lawyers down to recent times, the reason lying in a history of archaic ideas too long to be traced here." Sir F. Pollock, 27 ENCYCL. BRITANNICA, 11 ed., 65.

[33] MARKBY, ELEMENTS OF LAW, 3 ed., § 693.

[34] SALMOND, JURISPRUDENCE, ed. 1902, 457.

[35] Mr. Holdsworth, in 2 HISTORY OF ENGLISH LAW, 42, speaks of "the dominant conception of the Anglo-Saxon law — the idea that a man acts at his peril"; and again, in vol. 3, 303–04, "the leading principle of the mediæval common law that a man acts at his peril." Compare vol. 3, 299. See also POLLOCK, TORTS, 10 ed., 15. "The archaic law of injuries is a law of absolute liability for the direct consequences of a man's acts, tempered only by partial exceptions in the hardest cases."

[36] POLLOCK, TORTS, 10 ed., 505.

[37] HOLMES, COMMON LAW, 154, 155.

[38] Ed. 1902, 456.

"These may well be tolerated only on the condition of making compensation to all who suffer from them, irrespective altogether of any question of negligence." [39]

What is the present scope, or application, of this common-law doctrine? Which way are courts now tending — to extend it or to restrict it? How far, if at all, will the decisions of courts be influenced by recent legislation, which brings about, as to large classes of persons, results absolutely incongruous with those reached under the modern common law as to persons not affected by such statutes?

What sort of cases are now usually held to fall under this head of acting at peril, or extra-hazardous user?

No attempt is here made to give an exhaustive enumeration of all possible cases of acting at peril.[40]

We only call attention to some prominent instances, stated in very general terms.

1. Absolute liability of the owner of certain animals for damage done by their straying from his land onto a neighbor's land. This applies to classes of animals which, if not restrained, are liable to stray from the owner's land to his neighbor's land and are likely to do damage there. The doctrine of absolute liability in such cases is a survival of the time when every man was liable for all damage

[39] It has been suggested that these exceptional cases of absolute liability may be explained as "being based on a conclusive presumption of negligence." But the phrase "conclusive presumption," when employed in this connection, is objectionable. It is used to conceal the fact that the courts are laying down a rule of substantive law under the guise of a rule of evidence. In the words of Professor Williston (24 HARV. L. REV. 425), a conclusive presumption "is a rule of substantive law masquerading as a rule of evidence."

For criticism of the term "conclusive presumption" and of its use in the above manner, see 1 AUSTIN, JUR., 3 ed., 508, 509, 510; GRAY, NATURE AND SOURCES OF THE LAW, § 228; 4 WIGMORE, EVIDENCE, § 2492; 2 CHAMBERLAYNE, MODERN LAW OF EVIDENCE, §§ 1145, 1146, 1149, 1160.

[40] It must be remembered that we are here speaking of cases of accident as distinguished from mistake. The term "acting at peril" may also be used in reference to cases of mistake, *e. g.*, intermeddling with tangible objects of property under a *bonâ fide* and non-negligent mistake as to title (see discussion, *ante*). So as to vicarious liability; a master may be said to act at peril when he carefully selects and directs a servant. He may be liable for a tort of the servant when acting within the scope of his engagement, though in violation of his orders.

We do not here discuss "a principle of limited application that 'unlawful' acts — signifying an illegality, usually statutory, independent of the question at issue — are done at peril." See Professor Wigmore, 8 HARV. L. REV. 388. As to breach of statutory duties, see also SALMOND, TORTS, 4 ed., 557, paragraph 5.

done by him or his property, though entirely without his fault.[41] The doctrine does not prevail in many of our newer states. It is to-day so exceptional that it does not furnish a sufficient basis upon which to argue from analogy; and several American courts criticise the attempt of Blackburn, J., to thus use it in *Fletcher* v. *Rylands*.[42]

2. Absolute liability of the owner of certain animals for damage done by them other than trespass to land. This applies in the two following cases:

(*a*) If the animal belongs to a class which the court regards as having a natural propensity to do the particular kind of damage in question.

(*b*) If the particular animal, though belonging to a class not naturally or usually so inclined, has a special propensity to do this kind of damage, and the owner is aware of the existence of such propensity.

Until quite recently it was the general opinion that in both the above cases the owner was liable irrespective of negligence and that proof of care on his part would not exonerate him. We think that this view is still supported by the weight of authority, especially by decided cases.[43] But the opposite view is supported, at least as a question of principle, by the high authority of Judge Cooley, Dr. Bishop, and Mr. Beven.[44]

3. Absolute liability in case of blasting, when substances are thereby thrown on the land of plaintiff.

In such a case the great weight of authority imposes absolute liability.[45]

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[41] See SALMOND, JURISPRUDENCE, ed. 1902, 464.

[42] See Doe, J., 53 N. H. 442, 449–50. Beasley, C. J., 38 N. J. L. 339, 341–42 (1876); Earl, C., 51 N. Y. 476, 483 (1873).

[43] See SALMOND, TORTS, 4 ed., 428; POLLOCK, TORTS, 10 ed., 520–21; CLERK & LINDSELL, TORTS, 6 ed., 479–80, 487–89; HOLMES, COMMON LAW, 154.

[44] See COOLEY, TORTS, 3 ed., 696–97, 706–08; BISHOP, NON-CONTRACT LAW, §§ 1225, 1230; Mr. Beven, 22 HARV. L. REV. 468, 478, 483–84. See also De Gray *v.* Murray, 69 N. J. L. 458, 55 Atl. 237 (1903). And compare Worthen *v.* Love, 60 Vt. 285, 14 Atl. 461 (1888); Hayes *v.* Smith, 62 Ohio St. 161, 182, 56 N. E. 879 (1900); Fake *v.* Addicks, 45 Minn. 37, 38, 47 N. W. 450 (1890).

[45] COOLEY, TORTS, 2 ed., 392; BISHOP, NON-CONTRACT LAW, § 831. For a case which does not go to this extent, see Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991 (1892), and 8 Wash. 162, 35 Pac. 621 (1894).

We do not consider here whether the throwing of substances upon plaintiff's land is the only result of blasting for which there is absolute liability.

4. Absolute liability for excavating in one's own land, with the result of subsidence in the surface of another's land, or of soil falling away from another's land.

This topic is sometimes indexed under such titles as "Withdrawal of support for land," "Right of support for land," "Right to support of soil from soil," "Liability for removal of lateral or subjacent support of land in its natural condition." "Land" here means land without any buildings upon it, or where the presence of buildings did not contribute to produce the subsidence or falling away.

In an action for causing the fall of buildings, when the land would not have given way but for the weight put upon it by the buildings, actual negligence by the excavator must be proved. But in judicial opinions and in textbooks it has almost universally been assumed that liability for excavation causing the fall of land which has no building upon it exists irrespective of negligence and that proof of care on the part of the excavator will not exonerate him.

This view is, however, controverted by Mr. Salmond,[46] who says:

"There is no sufficient reason for supposing that the infringement of a right of support is any exception to the general principle that liability for a tort depends on the existence of wrongful intent or culpable negligence."

An opinion of Mr. Salmond's is always entitled to consideration. But we believe that to-day the above rule of absolute liability for damage to land by excavation would be applied in most common-law jurisdictions.[47]

[46] TORTS, 4 ed., 279.

[47] It must be admitted that, until a comparatively recent date, the precise question was hardly ever the subject of express adjudication. In a majority of the cases the precise point in judgment was "the extent of the right where buildings had been erected on the land for which support was claimed." See Monographic Note, in 33 Am. St. Rep. 446 *et seq.*, especially p. 447. But in these cases, "complicated by the existence of artificial structures," judges have repeatedly said that negligence was not essential to an action when the land which gave way had no buildings upon it; and this proposition has been stated by text-writers as undoubted law. And there are now American cases where this point has been directly decided. See Foley *v.* Wyeth, 2 Allen (Mass.) 131 (1861); Mosier *v.* Oregon Nav. Co., 39 Ore. 256, 61 Pac. 453 (1901);

5. Absolute liability for defamatory statements actually or theoretically damaging, published on an unprivileged occasion, and not justifiable on the ground of truth.

Defendant is not exonerated by proof that the statements were published under a non-negligent but mistaken belief, either (1) that facts existed creating a privilege, or (2) that the statements were true.[48]

6. Absolute liability in an action for slander (disparagement) of title, brought against a stranger.

Defendant is not exonerated by proof that he was acting under a non-negligent but mistaken belief in the truth of his statement.[49]

As to the three following topics, there has been much discussion, and some conflict, as to whether absolute liability should be imposed for damage, irrespective of negligence.

7. Use of Fire. 8. Manufacture and Storage of Dangerous Explosives. 9. Collecting and Keeping Water in a Reservoir.

The discussion has occupied more space in the reports than that

Nichols *v.* City of Duluth, 40 Minn. 389, 42 N. W. 84 (1889); Schultz *v.* Bower, 57 Minn. 493, 496, 59 N. W. 631 (1894); Matulys *v.* Philadelphia Coal and Iron Co., 201 Pa. St. 70, 76, 50 Atl. 823 (1902); Richardson *v.* Vermont Central R. Co., 25 Vt. 465, 471 (1853).

In the leading case of Humphries *v.* Brogden, 12 Q. B. 739 (1850), the court, in allowing an action for withdrawal of subjacent support, relied largely upon the analogy of liability for withdrawal of lateral support, and expressly said (p. 757) "that the present action is maintainable notwithstanding the negativing of negligence in the working of the mines."

There are several English cases which carry the rule of liability without negligence so far as to apply it to buildings, in cases where the presence of the building did not contribute to the giving way of the land. They hold that, in an action for causing soil to sink which would have sunk if there had been no building upon it, the damages recovered may include the harm to the buildings also. And they distinctly hold that proof of negligence is not requisite for that purpose. See Haines *v.* Roberts, 7 El. & Bl. 625 (1857), affirming 6 El. & Bl. 643 (1856); Stroyan *v.* Knowles, 6 Hurl. & Norman 454 (1861); Brown *v.* Robins, 4 Hurl. & Norman 186 (1859); Hunt *v.* Peake, N. V. R. Johnson, Ch. 705 (1860).

In Massachusetts the unqualified rule of liability in the absence of negligence "is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures." In the latter case there must be proof of actual negligence. Gilmore *v.* Driscoll, 122 Mass. 199 (1877). But in this very case plaintiff was held entitled to recover damages occasioned "by loss of and injury to her soil alone," although there was no proof of negligence. See Gray, C. J., pp. 207–08.

[48] See *ante*, p. 320.

[49] See *ante*, p. 320, as to action against a rival claimant.

concerning some of the instances of absolute liability enumerated *ante*. As to the three topics just named, our purpose is to indicate, in a very general way, what we regard as the rule established, or likely to be established, by the weight of American authority.

7. As to use of fire. Whatever the English law may be, the American common law is tolerably well settled. One who sets a fire on his own premises, indoors or out-of-doors, for a lawful purpose, is not held to insure his neighbors against damage from the spreading of such fire. He is not regarded as making an extra-hazardous use of his property, and hence acting at peril. He is liable only for negligence in setting or watching the fire. If he used reasonable care, under the circumstances, as to the place, time, and manner of setting the fire, and as to his preventing it from spreading, he is not liable.[50] By the weight of American authority the above rule of non-liability in the absence of negligence is applied to the use of fire for mechanical or manufacturing purposes, as well as to the use of fire for ordinary domestic or agricultural purposes.[51]

8. As to the manufacture and storage of dangerous explosives, it can hardly be said that any definite rule is yet established by a decisive weight of authority.

Some years ago the present writer suggested the following rule as likely to be established:

One who manufactures dangerous explosives, or who stores them in large quantities, in such a locality or under such circumstances as to cause reasonable fear to persons living in the vicinity, is liable, irrespective of negligence in manufacturing or in keeping, for all damages resulting from explosion — unless the factory or the magazine is located "so as to endanger as few persons and as little property as possible, and yet be reasonably accessible as a point of supply and distribution."

9. Does a person maintaining a reservoir act at peril?

If this question must be categorically answered, an English lawyer would probably say "Yes," citing *Rylands* v. *Fletcher*,[52] while

[50] COOLEY, TORTS, 3 ed., 1221–22; BURDICK, TORTS, 2 ed., 451; 2 JAGGARD, TORTS, 842; BISHOP, NON-CONTRACT LAW, § 833.

[51] COOLEY, TORTS, 3 ed., 1224.

[52] L. R. 3 H. L. 330 (1868).

an American lawyer would probably say "No, by the weight of American authority." But both lawyers would desire further information as to the location, purpose, size, and capacity of the "reservoir." Even in England it is held that maintaining a cistern on the top floor of a house for the supply of water to the occupants does not involve absolute liability to an adjoining owner if the water escapes without fault.[53] The Blake case was decided by a single judge. But in later cases in the higher English courts, where occupants of the house were held barred from recovery, the language of the court clearly indicates that an adjoining owner would also have failed to recover in the absence of negligence.[54]

Where a riparian owner builds a dam across a natural watercourse in order to utilize water for manufacturing purposes, the effect is to collect and maintain in the mill pond a much larger quantity of water than would otherwise be found there. But if the dam is carefully constructed and maintained, it is settled law in the United States that the builder is not liable for harm done by its giving way.[55] This, says Professor Bohlen, is "a class of case on the surface practically indistinguishable from *Rylands* v. *Fletcher*." [56]

A general rule enunciated by the court in *Rylands* v. *Fletcher* will be commented upon later.

(*To be continued.*)

Jeremiah Smith.

CAMBRIDGE, MASS.

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[53] Blake *v.* Land, etc. Corporation, 3 T. L. R. 667 (1887); McCord Rubber Co. *v.* St. Joseph Water Co., 181 Mo. 678, 81 S. W. 189 (1904).

[54] See Wright, J., in Blake *v.* Woolf, [1898] 2 Q. B. 426, 428; Lord Moulton, in Rickards *v.* Lothian, [1913] A. C. 263, 280.

[55] See cases collected in 59 U. PA. L. REV. 315, n. 22, and City Water Power Co. *v.* City of Fergus Falls, 113 Minn. 33, 128 N. W. 817 (1910).

[56] 59 U. PA. L. REV. 315.